Hearing:
September 19, 2002 Mailed: 10/8/02

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Team Health, Inc.

Serial No. 76/016,938

Mark S. Graham for Team Health, Inc.

Dayna J. Browne, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Hanak, Walters and Drost, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Team Health, Inc. (applicant) seeks to register in typed drawing form ACCESS NURSE for “physician referral services” (Class 35) and “providing health care information by telephone by means of a triage service and scheduling services for persons to attend health-related classes offered by hospitals, clinics, and health care providers” (Class 42). The application was filed on April 4, 2000 with a claimed first use date of December 1995.

At the request of the Examining Attorney, applicant disclaimed the exclusive right to use NURSE apart from the mark in its entirety.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's services, is likely to cause confusion with the mark ACCESS NURSING SERVICES and design (shown below), previously registered for "providing nursing personnel to render health care services to patients, excluding educational, counseling, psychological, or consulting services provided to, or related to the professional and personal development of, health care professionals." Registration No. 2,057,656. This cited registration contains a disclaimer of the words NURSING SERVICES.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining

Attorney filed briefs, and were present at a hearing held on September 19, 2002.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.")

Considering first the marks, we note that marks are compared in terms of visual appearance, pronunciation and connotation. In terms of visual appearance, the two marks are only somewhat similar in that the registered mark is depicted in a decided stylized manner. In terms of pronunciation and connotation, the two marks are decidedly more similar. Obviously, one would not pronounce the design feature in the registered mark. Thus, in terms of pronunciation and connotation, the comparison is between applicant's mark ACCESS NURSE and registrant's mark ACCESS NURSING SERVICES.

However, applicant has properly made of record over 60 third-party registrations of marks containing the word ACCESS which are for goods or services in the health care

field. At page 11 of its brief, applicant argues "that the term ACCESS is very dilute in the health care industry and is therefore entitled to a very narrow scope of protection in this field." In response, the Examining Attorney concedes at page 3 of her brief that in the health care industry, the term "access" is indeed "weak."

Despite the weakness of the term "access" in the health care industry, we would nevertheless find that applicant's mark and registrant's mark are similar enough such that if they were used on related services directed to the same purchasers, there would be a likelihood of confusion. However, such is not the case. Applicant's services are directed to ordinary individuals. On the other hand, registrant's services of providing nursing personnel are directed to hospitals, nursing homes, doctor's offices and other institutions. Moreover, the users of registrant's services (health care providers) are sophisticated, a point which the Examining Attorney concedes at page 8 of her brief. In this regard, the predecessor to our primary reviewing Court has held that health care providers are "a highly intelligent and discriminating public." Warner Hudnut, Inc. v. Wander Co., 280 F.2d 435, 129 USPQ 411, 412 (CCPA 1960). Our primary reviewing Court had made it clear that purchaser

"sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care." Electronic Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992).

At page 8 of her brief, the Examining Attorney, without evidentiary support, speculates that "the registrant's services may be encountered by the same patients" as applicant's services. (Emphasis added). Assuming for the sake of argument that on rare occasion an individual may use nursing personnel placement services (registrant's services), such "overlap in customers is too small to be significant much less dispositive." Electronic Design & Sales, 21 USPQ2d at 1392.

Given the fact that applicant's services and registrant's services are directed to different purchasers, and the additional fact that the purchasers of registrant's services are sophisticated, we find that the contemporaneous use of applicant's mark and registrant's mark is not likely to result in confusion, mistake or deception.

Decision: The refusal to register is reversed.